IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 300 of 1989
With
CRIMINAL APPEAL No. 325 of 1989
With
CRIMINAL APPEAL No. 956 of 1990

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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MANGALSING BHANSING RAJPUT - Appellant
Versus
COLECTOR OF CUSTOMS & 1 - Opponent

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Appearance :

1. CRIMINAL APPEAL No. 300 of 1989

MR HN JHALA for Appellant.

MR HARIN RAWAL, ASST. SOLICITOR GENERAL for Opponent No. 1.
MR KT DAVE, APP for State of Gujarat.

2. CRIMINAL APPEAL No. 325 of 1989

MR EE SAIYED for Appellant.
MR KT DAVE, APP for State of Gujarat.
MR HARIN RAWAL, ASST. SOLICITOR GENERAL for Central Excise Department.

3. CRIMINAL APPEAL No. 956 of 1990

MR HARIN RAWAL, ASST. SOLICITOR GENERAL for Central Excise Department.

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CORAM :	HONOURABLE MR.JUSTICE A.M.KAPADIA
	and
	HONOURABLE MR.JUSTICE K.A.PUJ

Date : 05/03/2007
COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. Since all these three appeals are arising out of the same judgment and order of the learned Additional Sessions Judge, Court No. 2, Ahmedabad, all these appeals are heard together and the same are being

disposed of by this common judgment and order.

2. Criminal Appeal No. 300 of 1989 is filed by the appellant – original accused No. 3, namely, Mangalsing Bhansing Rajput, Criminal Appeal No. 325 of 1989 is filed by the appellant – original accused No. 2 – Bansi Rupaji Chauhan (Darji) and Criminal Appeal No. 956 of 1990 is filed by the Superintendent, Central Excise (Prevention), Ahmedabad against the very same judgment and order passed by the learned Additional Sessions Judge, Ahmedabad in Sessions Case No. 266 of 1987 whereby the appellants – original accused Nos. 3 & 2 in Criminal Appeal Nos. 300 & 325 of 1989 respectively were convicted for an offence punishable under Section 8 (c) read with Section 21 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (for short 'NDPS Act'). Along with the accused Nos. 2 & 3, original accused No. 1, namely, Bharat Girjashankar Raval was also convicted for an offence punishable under Section 8 (c) & 21 of the NDPS Act and he has preferred Criminal Appeal

No.363 of 1989 which was heard and disposed of by this Court by judgment and order dated 05.10.1995 and he was acquitted from the charge levelled against him. While convicting all the three accused under Section 8 (c) read with Section 21 of the NDPS Act, the learned Additional Sessions Judge, Ahmedabad has acquitted all the three accused from the charge of offence punishable under Section 29 of the NDPS Act. Against this acquittal order, the Superintendent, Central Excise (Prevention), Ahmedabad has filed Criminal Appeal No. 956 of 1990. All the three accused were sentenced to undergo R.I. of 10 years and fine of Rs. 1 Lac each and in default thereof, to undergo R.I. of one year more.

3. Briefly stated, the prosecution case as disclosed from the complaint as well as unfolded during the trial, is as under :-

4. One Mr. Abrahusen Sokathusen, Inspector, Central Excise & Customs received an information on

22.09.1987 at about 8.30 p.m. that between 01.00 to 02.00 p.m. on 23.09.1987, one Bharat Raval was to come with about 2 Kgs. of brown sugar to deliver it to one Mr. Bansilal Darji in Flat No. 2/4 of Uma Sut Society, Behind Anjalee Cinema, Vasna, Ahmedabad. On receipt of this information, he called on Mr. N.R. Malek, Inspector of his department and they located from outside the Flat No. 2/4 of Uma Sut Society and also house of Mr. Bharat Raval. He then reduced into writing the said information on coming to the office at Jivabhai Mansion which was known as DRI (Information) Report. On this information being conveyed by the Deputy Collector Shri Bhargav, Central Excise and Customs Authorities kept a watch in company of Panchas on the said flat. During the watch, two persons came on a Scooter which they stopped and parked near the house of Bansi Rupaji Chauhan (Darji). The person driving the scooter wearing the white shirt took out a cloth bag from the front dickey of the scooter and he, in the company of the pillion rider, went inside the house of Bansi Rupaji Chauhan (Darji). One who drove the Scooter

is the accused No. 1 and Shri Bansi Rupaji Chauhan (Darji) is accused No. 2. As the accused No. 1 and the pillion rider went inside the flat, the Excise officials in company of Panchas also entered the flat and they saw three persons sitting in a room, two of whom were Scooter driver and the pillion rider. First person was Bansi Rupaji Chauhan (Darji), accused No. 2. On enquiring the names, they disclosed their name and pillion rider disclosed his name as Champaklal. When the Excise and Custom personnels entered the room in the flat, the accused No. 1 was holding cloth bag which contained a card board box. The said card board contained a plastic bag which again contained a cloth bag with some marks which appeared to be of Pakistan / Afghanistan. On opening the same, brown sugar weighing 985 Gms. of the value of Rs.59,100/- was found. The said brown sugar was seized under panchnama prepared in presence of Panchas which was also signed not only by Panchas but also by accused Nos. 1 & 2.

5. Thereafter accused Nos. 1 & 2 were taken to the Central Excise Office and on interrogation, the name of the accused No. 3 i.e. Mangalsing transpired as a person who had delivered the brown sugar for sale to accused No. 2 who in turn gave it to accused No.1. The statements of all the accused were recorded under Section 67 of the NDPS Act wherein they have admitted the possession thereof. Accused No. 3 also admitted during interrogation that he had given the bag to accused No. 2, a week prior to the seizure thereof and he has also visited the house of accused No. 2 some days prior to the seizure to take sale consideration thereof. As accused No. 3 pressed hard for money, accused No. 2 called for the said brown sugar from accused No. 1 and he had gone to the house of accused No. 2. But in view of the fact that the persons had assembled near his flat, he having smelt raid there, returned from there, instead of entering the flat. Accused No. 3 was then contacted and interrogated and he also admitted delivery of the brown sugar to accused No. 2. His statement under Section 67 of the NDPS Act was

also recorded.

6. At the time of the seizure of the brownsugar, three samples were drawn from the said substance in presence of the Panchas and accused Nos. 1 & 2. All the three accused were arrested on 24.09.1987 at about 18.00 hours and were produced before the Chief Metropolitan Magistrate on 25.09.1987 at about 11.45 a.m. None of them had complained about any ill-treatment and they were sent to judicial custody till 26.09.1987. On that very day i.e. On 25.09.1987, seized muddamal along with the samples were produced before the Chief Metropolitan Magistrate as required under the Provisions of the NDPS Act and it was also prayed to allow them to send one of the samples to the Forensic Science Laboratory ('FSL' for short), Ahmedabad. The learned Chief Metropolitan Magistrate, Ahmedabad however ordered that the muddamal be kept with the department and permission to send one of the samples to FSL was granted. The Custom and Excise Department having

received the statements of the witnesses and on receipt of the report from the FSL as substance being Diacety morphine (heroin) filed a complaint in the Court of Chief Judicial Magistrate at Ahmedabad. The said complaint was registered against all the three accused being Criminal Case No.2374 of 1987 on 13.11.1987. The learned Chief Judicial Magistrate by his order dated 07.12.1987 committed the case to the Sessions Court, Ahmedabad for trial as offence alleged against the accused was exclusively tried by the Sessions Court, Ahmedabad.

7. The learned Additional Sessions Judge, Ahmedabad to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under Section 8 (c) and 21 read with Section 29 of the NDPS Act which was read over and explained to them. As the accused pleaded not guilty to the charge and claimed to be tried, they were put to trial and tried in Sessions Case No. 266 of 1987.

8. To prove the culpability of the accused, prosecution has in all examined as many as 6 witnesses, details of which are as under :-

Sr. No.	Exh. No.	Particulars	Page Nos.
01.	42	P.W. 1 – Bhailal Manishankar Bhatt.	119-183
02.	68	P.W. 2 - Rameshchandra N. Kusumgar.	323-349
03.	69	P.W. 3 – Abrahusen Sokathusen.	351-381
04.	60	P.W. 4 – Dhirubhai Ravjibhai Siroya.	383-403
05.	73	P.W. 5 – Rambhav Laxmanrao.	409-413
06.	74	P.W. 6 – Indresh Patubhai Acharya	415–431

9. Prosecution has also produced several documents and relied upon the contents of the same, details of which are as under :-

Sr. No.	Exh. No.	Type of evidence	
01.	2	Charge	41-43

Sr. No.	Exh. No.	Type of evidence	
02.	43	Statement of accused No. 1 recorded under Section 67 of the NDPS Act.	203-215
03.	47	Statement of accused No. 2 recorded under Section 67 of the NDPS Act.	237-245
04.	48	Statement of accused No. 3 recorded under Section 67 of the NDPS Act.	247-253
05.	49	Further statement of accused No. 1	255-257
06.	50	Further statement of accusd No. 2.	259-263
07.	51	Further statement of accusd No. 3.	265-269
08.	58	Original complaint.	281-287
09.	77	FSL Report.	441-447

10. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Ahmedabad explained the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement, as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution by reiterating that they have been falsely implicated in the case. However, they have neither led any

evidence nor examined any witness to support their defence.

11. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Additional Sessions Judge, Ahmedabad has held that the contraband article brownsugar was recovered from the appellants – accused and the prosecution has been able to establish that the complexity of the accused for commission of the offences with which they were charged, has been proved beyond reasonable doubt and, therefore, he recorded the order of conviction and sentence against them to which reference is made in earlier paragraph of this judgment, giving rise to the first two appeals i.e. Criminal Appeal Nos. 300 of 1989 and 325 of 1989 at the instance of original accused Nos. 3 & 2 respectively and against acquittal order from the charge of offence punishable under Section 29 of the NDPS Act, the appeal is preferred by the Superintendent, Central Excise, Ahmedabad being

Criminal Appeal No. 956 of 1990.

12. Mr. H.N. Zala, learned advocate appearing for the appellant – orig. accused No. 3 in Criminal Appeal No. 300 of 1989 has submitted that though the papers were taken from him, since it is an old appeal, he relies on the grounds raised by the appellant in the appeal memo. He has neither any instruction nor any information showing the whereabouts of the appellant. He has submitted that the learned Additional Sessions Judge has grievously erred in law in convicting the appellant relying upon his statement recorded under Section 67 of the NDPS Act. The statement of the accused was recorded in Hindi whereas it transpired in evidence of the prosecution witnesses that the appellant is a permanent resident of Barmer in Rajasthan and he is an illiterate person who can only sign his name in Hindi and he does not follow Hindi language fluently. The alleged confessional statement was read over and explained to the accused No. 3 by original

accused No. 2 - Bansi Rupaji. This fact was brought out in the evidence of the prosecution witness No. 3 i.e. Inspector Abrahusen Sokathusen at Exh. 69 wherein during the cross-examination, he specifically admitted that the statement of the appellant – accused No. 3 was read over and explained to him by accused No. 2 - Bansi Rupaji. But he did not know in which language, the statement was explained. This fact was further brought out during the recording of the further statement of the appellant – accused No.3 when the Court had to appoint the son of the accused No. 3 as the interpreter to whom the questions were put in Hindi and who in turn explained the questions to the accused No. 3 in Marwadi language. The alleged confessional statement of the accused No. 3 at Exh. 48 wherein at the bottom of the statement, an endorsement is made by the complainant that the statement was read over and explained to him by Bansi Rupaji. He has further submitted that for proving the charge against the accused No. 3, the prosecution has relied upon the statement of accused No. 2 recorded under

Section 67 of the NDPS Act to corroborate the statement of the accused No. 3. The said statement of the accused No. 2 was of a co-accused statement and it was specifically retracted. Except for the statement of the accused No. 3 himself, which was also specifically retracted, there was no other evidence to corroborate the said statement. The statement of accused No. 3 was not at all corroborated by any independent evidence and, therefore, conviction of the accused No. 3 was based solely on corroboration of the accused No. 3's own confessional statement which was in the language which he did not follow or understand. The said conviction is, therefore, absolutely illegal and deserves to be quashed and set aside. Mr. Zala has further submitted that the accused No. 3 was wrongly convicted under Section 21 of the NDPS Act in view of the fact that he was acquitted for the offence under Section 29 of the NDPS Act. He has further submitted that Section 29 of the NDPS Act stipulates a criminal conspiracy for the commission of the offence under the NDPS Act. When the

charge under Section 29 has failed, the prosecution was obliged to lead evidence to prove beyond reasonable doubt that the accused No. 3 was in possession of the brown sugar. Therefore, the charge having failed under Section 29 of the NDPS Act, the accused could not be convicted under Section 21 of the Act. He has, therefore, submitted that the impugned judgment and order convicting the accused No. 3 under Section 21 of the NDPS Act deserves to be quashed and set aside.

13. Mr. E. E. Saiyed, learned advocate appearing for the accused No. 2 – Bansi Rupaji Chauhan has submitted that the judgment and order of the learned Additional Sessions Judge convicting the accused No. 2 is contrary to the evidence on record and against the settled legal principles. The muddamal articles were not found from the possession of the accused No. 2. The said muddamal was also not found from his house. The learned Additional Sessions Judge has convicted the accused No. 2 only

on the basis of the statement recorded by the Superintendent of Central Excise under Section 67 of the NDPS Act. The said statement was not given by the accused No. 2 voluntarily but it was prepared against the will and consent of the accused No. 2. He has further submitted that the said statement was not even ready at the time of its recording. Under Article 20 (3) of the Constitution of India, no statements of the accused are to be used against the accused. When he is the accused of an offence, he shall not be compelled to be a witness against himself. The accused No. 2 was taken in the custody on 23.09.1987 and he was not called by the Custom Officer to take his statement or for examination. He was directly taken from his house and thereafter, he was in the custody of the Custom Officer and the statement recorded on 23.09.1987 and 24.09.1987 were by force and hence, the said statements cannot be used against the accused No. 2. He has further submitted that after recording the statement on 23.09.1987, nothing happened thereafter and yet another statement was recorded on 24.09.1987 only

with a view to prove the case of the prosecution and to adduce more evidence. He has further submitted that the Superintendent of the Central Excise and the Customs is the Police Officer and hence, the statement or confession made at the time of arrest is to be excluded from the evidence. Hence, it is to be treated as a statement recorded under Section 25 of the Evidence Act. The prosecution has totally failed to prove the charge against the accused No.2. He has further submitted that the name which was given to Mr. Abraham Husain Shaukathusain, Central Excise Inspector on 22.09.1987 was the name of only Bharat Raval and the informant has said that Bharat Raval was going to Flat No. 2/4 Uma Sut Society, Vasna, Ahmedabad between 01.00 p.m. to 02.00 p.m. The name of accused No. 2 was not at all mentioned by the informant. He has, therefore, submitted that the accused No. 2 was not involved in the business of brown sugar. As per the story of the prosecution, Mr. Bharat Raval has come on 23.09.1987 and he was driving the Scooter and behind him Champaklal was sitting. The said

Champaklal's statement was not recorded by the Police and there is no explanation as to why his statement was not recorded. He has further submitted that the said Mr. Champaklal is the main witness in the matter and hence, it was necessary for the prosecution to examine him on oath. When the custom officials have entered in the house, the alleged contraband article was possessed by Shri Bharat Raval, accused No. 1 and hence, the statement of Champaklal is necessary. There was not a single independent witness saying that the contraband article was found from the possession of the accused No. 2. The panchas have not supported the case of the prosecution. Considering the entire facts and circumstances of the case, Mr. Saiyed has strongly urged that no case is proved against the accused No. 2 and hence, he is required to be acquitted from the charge levelled against him.

14. Mr. Harin P. Raval, learned Assistant Solicitor General appearing for the Customs and Central

Excise Department and Mr. K. T. Dave, learned Additional Public Prosecutor appearing for State of Gujarat, on the other hand, have submitted that the prosecution has proved its case beyond reasonable doubt and the accused have been rightly convicted under Section 8 (c) read with Section 21 of the NDPS Act. As far as appeal of the Customs and Central Excise is concerned, Mr. Raval has submitted that the prosecution case was that all the three accused had conspired to bring the brown sugar to Ahmedabad and sell it and in pursuance of the said conspiracy, the accused No. 3 had brought brown sugar worth Rs.59,100/- and the accused Nos. 2 & 3 tried to sell it but as they could not get proper customer in time, brown sugar was found with them. The learned Additional Sessions Judge while convicting the accused from the charge of offence under Section 29 of the Act has observed that sub-section (2) of Section 29 specifically clarifies that abetment or participating in criminal conspiracy must be to the commission of any act in a place without and beyond India. Therefore, if a person

who is a citizen in India hatches criminal conspiracy to commit an act without and beyond India, is said to have committed criminal conspiracy as contemplated under Section 29 of the NDPS Act. Therefore, the charge of abetment of criminal conspiracy under Section 29 of the NDPS Act did not survive. He has further submitted that the trial Court did not seem to have appreciated Section 29 properly. Section 29(1) refers to Section 116 IPC. Section 116 of IPC provides punishment for abetment of offence punishable with imprisonment. Notwithstanding anything contained in Section 116 IPC, the offence of abetment or conspiracy will be punished with punishment provided for the offence under the Act. Section 29 (1) refers to abetment or conspiracy committed in India. The Legislature wanted to provide punishment when abetment or conspiracy takes place out of India and that provision was made in Section 29 (2). Section 29 (2) provides that a person who, in India, abets or is a party to criminal conspiracy to the commission of an act in a place without and beyond India which would constitute an

offence if committed within India, commits an offence. Clause (2) does not restrict the provisions of Clause (1) of Section 29. He has, therefore, submitted that the finding given by the learned Additional Sessions Judge acquitting the accused Nos. 1 to 3 of offence punishable under Section 29 of the Act is neither supported by the facts on record nor by law and hence, it is required to be quashed and set aside. He has, therefore, submitted that the appeal filed by the department is required to be allowed.

15. One of the arguments canvassed by the learned advocates appearing for the accused was that the accused No. 1 was acquitted by this Court vide order dated 05.10.1995 passed in Criminal Appeal No. 363 of 1989 on the ground that mandatory provisions of Section 50 of the NDPS Act were violated. This Court took the view that non-compliance of the mandatory provision of Section 50 of the Act is indeed very serious because of which the accused

was required to be acquitted. On the same parity of reasoning, they have submitted that the present appellants – accused Nos. 2 & 3 are also required to be acquitted.

16. While considering this submission, we found that the appeals of the present two appellants could not be taken up along with the appeal of accused No.1 only because they were absconders. Subsequently, the said two appeals came up for hearing before the Division Bench of this Court (Coram :- M. S. Parikh & H.K. Rathod, JJ.). At that time also, the accused Nos. 2 & 3 were absconders. The Court was not inclined to agree with the view expressed by the earlier Bench. It was held in the order dated 29.12.1999 that in the present case, one of the concerned Officers being the Superintendent of Central Excise and Customs, a Gazetted Officer, it would not be necessary to ask the accused as to whether he wanted to be searched in presence of any Gazetted Officer or a Magistrate i.e. to say the requirement of

Section 50 of the NDPS Act could not be said to be necessary for being explored at the time of search. The Court, therefore, was of the view that there are conflicting and different views of the different Bench of this Court and the matter would require consideration by a larger Bench. Accordingly, they have directed the Registry to place the same before the Hon'ble Chief Justice for passing appropriate order for making reference as aforesaid.

17. Pursuant to the said order,Full Bench was constituted. The Full Bench vide its order dated 20.10.2000 took the view that looking to the Scheme of the Act and the provisions thereunder, particularly Sections 50, 41, 42 & 43, it is transparently clear that even if the officer authorised under Section 42 who is about to search a person is a Gazetted Officer, he has to discharge the obligation under Section 50 (2) so as to take the person about to be searched, before any other Gazetted Officer or Magistrate and merely because such Officer

authorised under Section 42 himself if a Gazetted Officer is not a valid ground to dispense with the requirement of Section 50 (2) so as to enable another Gazetted Officer or Magistrate to examine as to whether the person sought to be searched is required to be discharged forthwith or the search is actually required to be made.

18. Even when both these appeals were heard by the Full Bench and decided on 20.10.2000, accused Nos. 2 & 3 were absconders. There is a reference in the judgment of the Full Bench on the basis of the information given by he learned Additional Public Prosecutor appearing for the State of Gujarat that Shri Mangalsing Bhansing Rajput i.e. appellant in Criminal Appeal No. 300 of 1989 has expired. This information was not found to be correct as in subsequent order of this Court dated 18.01.2001, it was observed that on inquiry conducted by the Commissionerate of Customs and Central Excise, Ahmedabad-1, it is found that he is alive and at

present residing at Laxmipura, Naya Power House, Near Border House, Guard, Barmer. Subsequent to this, notices were issued. Bailable warrants were issued. Even non-bailable warrants were also issued. However, the same were not served. Even today also, accused Nos. 2 & 3 are absconders and their advocates have also no knowledge of their whereabouts. Since the appeals are of 1989, we could not adjourn the matter for indefinite period as more than 18 years have passed and hence, the appeals were taken up for hearing.

19. We have inquired from Mr. Harin Raval, learned Assistant Solicitor General appearing for the respondent – Customs and Central Excise Department as to whether the decision given by this Court in Criminal Appeal No. 361 of 1989 is taken up further before the Hon'ble Apex Court. On inquiry, he submitted that though the decision was not accepted and the department was inclined to file an appeal against that decision, since the accused No.1

has already undergone sentence of more than 8 years when the Division Bench has decided the appeal, the Department has thought it fit not to prefer any further appeal. He has, however, submitted that the benefit of that judgment cannot be given to the present appellants as Section 50 has been wrongly invoked in this case. As far as accused Nos. 2 & 3 are concerned, they have not been searched and nothing was found from their possession. They have been implicated as accused only on the basis of their statements recorded under Section 67 of the NDPS Act and hence, these two appeals are to be decided on the basis of their own merits. For non-applicability of Section 50 of the NDPS Act in the present case, reference is made to the decision of the Hon'ble Supreme Court in the case of **State of Haryana V/s. Ranbir Alias Rana (2006) 5 SCC 167**, wherein it is held that Section 50 of the Act is not applicable in a case where recovery of contraband article from plastic bag carried by at the relevant time. The Court further

held that in view of *Pawan Kumar (2005) 4 SCC 350*, observations made in *Namdi Francis Nwazor, (1998) 8 SCC 534* that if the accused is carrying a handbag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50, is merely an obiter and does not constitute the ratio decidendi and hence, Namdi Francis Nwazor (Supra) was correctly distinguished in Pawan Kumar (Supra). Considering the case of accused Nos. 2 & 3, even the bag was not found from them and hence, there is no question of invoking S. 50 of the NDPS Act.

20. The main submission of learned advocate appearing for the appellants – accused Nos. 2 & 3 is that since nothing was found from them, no case was made out against them. As far as statements recorded under Section 67 of the NDPS Act are concerned, they have submitted that the said statements are not voluntary statements and hence, no cognizance of the said statements should have been taken by the learned

Additional Sessions Judge while convicting the accused Nos. 2 & 3 for the offence punishable under Section 8 (c) read with Section 21 of the Act. The learned Additional Sessions Judge has addressed himself to a great length the issue raised before him. In the case of accused No. 2, his statements under Section 67 of the NDPS Act were recorded at Exh.47 & 50. The thirst of the argument is that a man would not state facts which are to be used against his own interest. There are no allegations of force or assault by Custom Officers on accused No. 2. Despite this fact, it was contended that the circumstances suggest that such statements of accused No. 2 could not have been said to be voluntary one. Accused No. 2 has not stated in his further statement that his statements recorded under Section 67 at Exh. 47 & 50 were not voluntary. Even in the case of accused No. 3, the learned Additional Sessions Judge has come to the right conclusion that his statement was voluntary one. If one would peruse the statements of accused Nos. 1, 2 & 3 recorded under Section 67 of the

NDPS Act, it would be clear that certain intrinsic facts stated in the said statements would never be known to the Custom Officers who have recorded the said statements and those facts were not necessary for the purpose for which the said statements were recorded.

21. Accused No. 2 in his statement Exh. 47 has stated the following facts :-

"That my father had a shop near Machhi market, three gates and he resides there..... my native place is Barmer and we have two houses in Barmer. My younger brother Omprakash, Younger brother Mukesh Ashokmal, Sister Atridevi and my wife Pavnidevi and a daughter aged two months are residing there. My eldest brother Chhagan Bhupjji resides at Palanpur. The name of his shop is Novelty Tailor. One Mangalsing Rajput had a Zonga Jeep."

These facts are exclusively of the personal knowledge of the accused No. 2. They were not

required to be disclosed by him ordinarily and if he would not have disclosed these facts, they could not have been known by Custom Officers. Accused No.2 had admitted that his statement at Exh. 47 is a voluntary one in his further statement at Exh. 50 on 24.09.1987. Thus, the fact stated in his statement Exh. 47 would not have been known by the Custom Officers and the disclosure thereof by accused No.2 suggest that his statement is a voluntary one and is truthful as the same has not been challenged by him.

22. Accused No. 3 has given a statement at Exh. 48 wherein following facts are stated :-

"I have 30 Bighas of land in my name. Names of my two brothers are Girakhsing and Praptapsing and they have died before. That I have four sons named Harsing, Laxmising, Tejasing and Dipsing and four daughters named Chhaganben, Dariyaben, Jasubai and Shasibai. I had come to Ahmedabad some 8 months before with one Mohanji to purchase a Truck and have put up with accused No. 2 who resides in

2/4 Uma Sut Flats. We stayed at Bansi's house because he hails from Barmer, Rajasthan. I had gone on the next day to the house of Bansi Rupaji. I had gone to Barmer on Monday and returned on Tuesday. I am shown one Passport No. Q 705894 and the photograph affixed thereon is of one Devendra Goal whom I very well know. He is a native of Barmer."

Accused No. 3 has given another statement Exh. 51 on 24.09.1987 wherein he has stated that he has given voluntary statement on 23.09.1987. From the statement of 23.09.1987, it is clear that the same has been voluntary as the facts referred to above in his statement could not have been known by the Custom Officers unless told by accused No. 3 and there was no necessity for accused No. 3 to tell those facts if he was not giving the statement voluntarily. The learned Additional Sessions Judge has, therefore, rightly come to the conclusion that the statement of accused Nos. 2 & 3 are voluntary and true. None of the facts of the statements of accused Nos. 2 & 3 are

challenged to be false.

23. Statements recorded under Section 67 of the NDPS Act of the accused Nos. 2 & 3 by themselves are sufficient to prove the charge levelled against them. It is not necessary to have an independent corroboration to these statements. To make good this proposition, support is derived from the following judgments :-

(a) In **Husen Bhenu Malad and Others V/s. State of Gujarat and Others, 2003(2) G.L.H. 705**, the Division Bench of this Court, wherein one of us, A.M. Kapadia, J. is a party, has held that it cannot be laid down as an absolute rule of law that the statement of an accused recorded under Section 108 of the Customs Act and Section 67 of the NDPS Act cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. To put it differently, there is neither rule of law nor of prudence that the

statement cannot be acted upon without corroboration. If the Court is satisfied that the statement is true and voluntary in nature, it can base conviction on it without corroboration. The Court has to scrutinise the statement carefully and must ensure that the statement is not result of coercion, duress or undue influence.

(b) In **M. Prabhulal V/s. Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449**, the Hon'ble Supreme Court has held that the accused – appellants in that case did not make any complaint before the Magistrate before whom they were produced complaining of any torture or harassment. It is only when their statements were recorded by the Trial Judge under Section 313 of Criminal Procedure Code that a vague statement about torture was taken. Under these circumstances, the confessional statements cannot be held to be involuntary. The statements were voluntarily made and can, thus, be made the basis of conviction.

(c) In **Mukesh Natvarlal Modi V/s. H.S. Barot and another, 1998 – XXXIX (1) G.L.R. 639**, the Division Bench of this Court has held that statements of accused and his family members were recorded by Customs Officers and since Customs Officers not being Police Officers, these statements are admissible in evidence.

(d) In **Usmanbhai Chandbhai Mansuri V/s. State of Gujarat and another, 2003 (3) XLIV (3) G.L.R. 1082**, the Division Bench of this Court has held that it is settled position that safeguards in respect of recording confessional statement as contained in Section 164 of the Criminal Procedure Code are not required to be followed by the empowered Officer, while recording statement under Section 67 of the NDPS Act until requirement is to ascertain whether such statement is voluntary or not.

(e) In **Surendra Kathadbhai Jebalia V/s. State of Gujarat, 2003 (3) XLIV (3) 2096**, the Division Bench of this Court has held that conviction can be found on retracted confessional statement of accused. If the statement was voluntary and it was true, then even if it is retracted, the inculpatory statement could be relied upon to base conviction. At the most, it would be required to examine the evidence and look for circumstances or evidence to reassure itself about the confessions made.

(f) In **Surjeet Singh Chhabra V/s. Union of India and others, (1997) 1 SCC 508**, the Hon'ble Supreme Court has held that in view of the confession made by the importer – petitioner that he had purchased the gold and brought the same, he is bound by the same and the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. The customs officials are not police officers. The confession, though retracted, is an admission and binds the

petitioner. So, there is no need to call panch witnesses for examination and cross-examination by the petitioner.

24.The learned Additional Sessions Judge has found that there was an independent corroboration on the record of the case. P.W. 3 received an information on about 08.30 p.m. on 22.09.1987 that there is going to be deal of brown sugar in Uma Sut Flat No. 2/4 between one Bharat Raval and Bansi Rupaji at about 1.00 p.m. on 23.09.1987. He has taken down this information in writing. When Custom Officer kept watch and raided the premises on arrival of accused No.1 in company of Champaji, accused No.2 was found in Uma Sut Flat No. 2/4. A packet weighing 985 Grams of brown sugar was also found from Uma Sut Flat. It is not the case of any of the accused that the said bag was not found from Uma Sut Flat No. 2/4. Statements which are recorded immediately after the search and seizure under Panchnama, disclosed certain facts pertaining to

accused Nos. 1,2 & 3 respectively which would not have been within the knowledge of the Custom Officer. Accused No. 3 was found from Chatrabhuj Hospital, Shahibaug on the basis of the facts disclosed by the accused No. 2. The fact that son of accused No. 3 has been admitted in the Hospital and the accused No. 3 needed money for the same and further fact that accused No.3 himself has admitted that he entered into deal as he was in need of the money are the circumstances corroborating the statements of accused Nos. 1, 2 & 3.

25. From the above referred confessional statements and incriminating materials found and seized, it is proved beyond any reasonable doubt that not only their confessional statements but other independent and corroborated evidence established their link with the commission of crime. From the statements of accused Nos. 1,2 & 3, the facts which emerged are that some time before 23.09.1987, accused No. 3 had brought with him contraband article and had

given it to accused No.2 to sell the same. Accused No. 2 in turn gave it to accused No. 1 either to store it or to sell it. Accused No. 2 called for the same from accused No. 1 as the deal was likely to go through on 23.09.1987 and particularly, he was hard pressed by accused No.3 to pay the value thereof. Thus, the learned Additional Sessions Judge has come to the conclusion that the contraband article was found from the possession of accused Nos. 1,2 & 3. Since the accused No.1 was acquitted merely on technical grounds and that issue is not now before us, we confirm the finding recorded by the learned Additional Sessions Judge qua the accused Nos. 2 & 3 of convicting them under Section 8 (c) read with Section 21 of NDPS Act.

26. As far as appeal filed by the Customs and Excise Department is concerned, we are of the view that the learned Additional Sessions Judge has rightly acquitted accused Nos. 2 & 3 as well as accused No.1 from the charge of offence punishable under

Section 29 of the NDPS Act. Since they were convicted of their independent act on the basis of their possession of contraband articles, there is no question of convicting them for abatement. Even otherwise, there is nothing on record which show that there was a meeting of mind amongst all the three accused for hatching conspiracy of dealing in contraband articles. The learned Additional Sessions Judge has rightly recorded the finding that accused No. 3 imported contraband article in state of Rajasthan, Barmer and from there to Gujarat. He possessed the same and thereafter gave it to accused No. 2 for sale. Accused No. 2 also possessed the same and thereafter gave it to accused No. 1 for sale or to warehouse it and thus accused No. 1 also possessed the same as he was to get Rs.500/- for the same. Accused No. 2 was to get a commission on the sale and accused No. 3 has already purchased the same from one of the alleged three smugglers. Thus, all the three accused have committed breach of Section 8 of the NDPS Act and since the contraband article, namely, brown sugar is

a manufactured drug and accused Nos. 1, 2 & 3 have committed breach of Section 8 of the NDPS Act and thereby have committed an offence under Section 21 of the NDPS Act. Therefore, accused Nos. 2 & 3 have been rightly convicted by him under Section 8 (c) read with Section 21 of the NDPS Act.

27. It is only when contraband article was found from the possession of the accused No. 1, the accused Nos. 2 & 3 were roped into the commission of crime. The accused No. 1 was acquitted by this Court though on technical ground and the Court has come to the conclusion in the case of the accused No. 1 that by non-observance of statutory provisions contained in Section 50 of the NDPS Act, the possession of the contraband articles by accused No.1 was not proved by the prosecution beyond any reasonable doubt and hence, benefit of doubt was given to the accused No. 1. So far as accused Nos. 2 & 3 are concerned, nothing was found from their possession. However, they were roped in

commission of crime on the basis of their confessional statements under Section 67 of the NDPS Act. That fact by itself is not sufficient to prove the charge under Section 29 of the NDPS Act levelled against them. It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail when the person alleged to have committed the offence is acquitted of that offence. Before the charge of aiding can be said to have been brought against the accused persons, it must be established that the principal person had in fact committed the offence which was sought to be aided by the accused persons. Since the accused No. 1 was acquitted and that decision has become final, the charge under Section 29 of the NDPS Act against accused Nos. 1, 2 & 3 cannot be proved. We are, therefore, of the view that even if the reasoning of the learned Additional Sessions Judge may not be approved for acquitting the accused Nos. 1,2 & 3 from the charge of offence under Section 29 of the NDPS Act and in a

given case, accused can be convicted under Section 29 (1) of the NDPS Act, there is no such circumstance in the present case which held them guilty under Section 29 of the NDPS Act and hence, they are rightly acquitted from charge of offence punishable under Section 29 of the NDPS Act.

28. On having close scrutiny of the evidence on record, we find no infirmity in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the learned Additional Sessions Judge, Ahmedabad. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence as according to us, no other conclusion is possible except the one reached by the learned Additional Sessions Judge, Ahmedabad on the facts and in the circumstances of the case.

29. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the learned

Additional Sessions Judge, Ahmedabad is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it right to invest more time in reiterating the same reasoning in our language or giving the same answers to the same criticism in our own words for the sake of brevity.

30. In the aforesaid view of the matter, according to us, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence qua accused Nos. 2 & 3 passed by the learned Additional Sessions Judge, Ahmedabad.

31. On the wake up of the aforesaid, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the learned Additional Sessions Judge, Ahmedabad qua accused Nos. 2 & 3 and the Departmental appeal also meets

with the same fate. Hence, all the three Appeals lack merit, and deserve to be dismissed. The respondent – Jail authorities are hereby directed to search accused Nos. 2 & 3 and bring them in judicial custody so that remaining imprisonment can be completed.

32. For the foregoing reasons, all the three Appeals fail and are accordingly dismissed.

[A. M. KAPADIA, J.]

[K. A. PUJ, J.]

Savariya